SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Supreme Court U. S.
FILED
APR 4 1906
JAMES H. MCKENNEY,
Clerk.

No. 81.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 82.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 586.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 588.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

JULIUS M. MAYER,
Attorney General of the State of New York,
Attorney for Defendant in Error.
HORACE MCGUIRE,
Deputy Attorney General.

WASHINGTON, D. C. 2014

POINTS FOR DEFENDANT IN ERROR.

Cause No. 81 was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of certiorari might be allowed directed to Erastus C. Knight, as Comptroller of the State of New York, who was the predecessor in office of Nathan L. Miller, the defendant in error, for the purpose of reviewing an assessment made by the Comptroller of the State of New York on the 13th day of December, 1901, to the amount of $106,000,000, upon which the tax computed was $159,000 (R. 81, page 7). The writ was granted and was heard at the Appellate Division, Third Department, State of New York, in the first instance, and by the determination of the said Appellate Division, Third Department, it was ordered (R. 81, page 42) that the determination of the Comptroller be corrected and restated and said taxes be reduced by the sum of $29,011.07, and judgment of the Appellate Division was entered thereon September 20, 1902 (R. 81, page 42). Both parties appealed from the determination of the Appellate Division to the Court of Appeals (R. 81, page 46), and the Court of Appeals modified the order of the Appellate Division as indicated in the opinion of Judge Haight (R. 81, page 49), as follows:

> "In view of the fact that there is no expressed finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the Appellate Division and that of the comptroller should be modified accordingly."

Chief Judge Parker and Judges Bartlett, Martin, and Cu
len concurred with Judge Haight in this opinion (page 54
and thereupon the remittitur of the Court of Appeals was r
mitted to the Supreme Court of the State of New York, a
by an order February 14, 1903, the judgment of the Court
Appeals was made the judgment of the Supreme Court (
81, page 47). In the meantime, Erastus C. Knight h
ceased to be the Comptroller of the State of New York, and
rehearing was had before Nathan L. Miller, as Comptrol
of the State of New York, and upon such rehearing the
fendant in error, on the 23d of April, 1903, determined "t
none of the rolling stock of the relator, the said N. Y. C.
H. R. R. R. Co. was, during the year in question (to wit,
year ending October 31, 1900), continuously and exclusiv
employed without the State of New York, and that the
lator is not entitled to any deduction from the amount fou
assessable by said judgment of the Court of Appeals on
count of the employment of any rolling stock outside of
State of New York during the year in question" (R.
page 64).

Whereupon the relator again applied for a writ of certio
against the defendant in error to review this determinat
and on the 13th day of June, 1903, the order for the issua
of the writ was granted by the Special Term (R. 81, page
and the writ granted (R. 81, page 57). The evidence ta
and proceedings had before Comptroller Miller, which
sulted in his determination of April 23, 1903 (R. 81,
64), was returned to the Appellate Division and is foun
R. 81, page 70, *et seq.*

Such proceedings were had upon the return of the
of certiorari in the Appellate Division, Third Departmen
the State of New York, that by an order duly made by
Appellate Division on the 10th day of November, 1903,
determination of the Comptroller was unanimously
firmed (R. 81, page 90). The opinion of the Appellate
vision upon this unanimous confirmance was written by

Justice Houghton and unanimously concurred in by his associates in that court (page 91). The relator then appealed to the Court of Appeals from the determination of the Appellate Division, Third Department (R. 81, page 92), and the Court of Appeals found and did order and adjudge (R. 81, page 94) that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and further recited that, the relator having contended in the Court of Appeals that if the statute purported to authorize the tax here in question, said statute was a violation of the Constitution of the United States in the particulars following:

The court held and adjudged: (1) The statute does not offend against the commerce clause (article 1 of section 8) of the Federal Constitution; (2) does not contravene the provisions of article 1, section 10 thereof, forbidding impairment of the obligations of contracts; (3) does not offend against the provisions of the fourteenth amendment thereof, forbidding the State to deprive any person of property without due process of law (R. 81, page 94).

On the 12th day of March, 1904, by an order of the Special Term, the judgment of the Court of Appeals so affirming the order of the Appellate Division and the determination of the Comptroller in auditing and stating the account of the relator for the State franchise tax based on the value of the capital stock of the relator employed in the State of New York for the year ending October 31, 1900, amounting to $159,000, was made the judgment of the Supreme Court of the State of New York (R. 81, page 96), and judgment was duly entered thereon (R. 81, page 97). The relator made its petition in the Supreme Court of the United States for a writ of error to the Supreme Court of the State of New York (R. 81, page 97), setting forth assignments of error (R. 81, page 105), and on the 2d day of August, 1904, a writ of error was granted (R. 81, page 112).

The question of fact to be determined by the Comptroller in view of the remittitur of the Court of Appeals upon such

evidence as should be produced before him was practically *what portion of the relator's rolling stock was used continuously outside of the State* in case it should be claimed that some portion of the relator's rolling stock was so used (R. 81, page 49). Before the Comptroller it was so claimed by the relator, and the relator gave certain evidence before the Comptroller which it claimed tended to establish that fact. It was claimed, however, by the Comptroller that the evidence given by the relator did not tend to establish this fact, and that no evidence was given before him competent to prove that any portion of the defendant's rolling stock was continuously without the State of New York for the year ending October 31, 1900. The Appellate Division and the Court of Appeals of the State of New York passed upon this evidence and decided that there was no proof before the Comptroller that any portion of its rolling stock was continuously without the State of New York during the period covered by the tax.

The tax in question was levied in pursuance of section 182 of the Tax Law, known as chapter 908 of the Laws of 1896, and in force during the years 1900, 1901, 1902, 1903 and 1904, and which provided for an annual tax of one and one-half mills upon such portion of the capital stock, at par, as the amount of capital employed within the State of New York bore to the entire capital of the corporation.

In the consolidation of these five cases, being numbers 81, 82, 586, 587 and 588, a word of explanation perhaps is necessary to show the exact position of the several cases.

The Comptroller finally adjusted the value of the capital stock of the relator in each of the tax years as follows:

No. 81, tax for 1900	$106,000,000.00
No. 82, tax for 1901	115,593,160.00
No. 586, tax for 1902	136,199,837.76
No. 587, tax for 1903	122,535,265.99
No. 588, tax for 1904	112,588,111.73

and the tax thereon computed at one and one-half mills

No. 81, tax for 1900	$159,000.00
No. 82, tax for 1901	173,389.74
No. 586, tax for 1902	204,299.76
No. 587, tax for 1903	183,802.90
No. 588, tax for 1904	168,882.17

The evidence taken in numbers 586, 587, and 588 is the same differing only in the amount of the appraised value of the capital stock for each of those years and the amount of the tax.

On page 26 of the record in 586, counsel for the plaintiff in error stated before the Comptroller his position in regard to the question which is before this Court, as follows:

> "That is to say practically sixty per cent. of our rolling stock, that is, in our freight cars, and a considerable percentage of our passenger cars, but much smaller, are constantly in the service upon foreign lines and outside of the State. It is not any particular cars that are so used. They are changing every day and every hour of the day, so with something upwards of forty millions' worth of rolling stock, we have the use ourselves of practically two-fifths of it. That is to say, the other three-fifths, substantially that, is on foreign roads and in use by them, and largely in use that we cannot control, if we wanted to, because in the course of business cars are transferred from one company to another without consultation at all with the owning company."

The stipulation hereafter referred to appears in cases 586, 587 and 588, as follows:

> By Counsel: "It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Railroad Company that was used permanently, continuously or exclusively without the State during the entire tax year in question" (R. 586, page 34; R. 587 and 588, each at page 33).

Cases 586, 587 and 588 were progressed through the Court of Appeals of the State of New York in order that any Federal question, if one exists, raised in cases 81 and 82, and which were then pending in this court, might be argued with cases 586, 587 and 588.

The judgment of the Court of Appeals of the State of New York, in 586, 587 and 588, was rendered January 23, 1906 (R. 586, page 171; R. 587 and 588, each at page 170), and the remittitur from the Court of Appeals, at pages 170 and 171, in the cases of 586, 587 and 588, states that the relator contended in the Court of Appeals that the statute, if it purported to authorize the said tax, and the authority exercised under the statute in and by the imposition and exaction of the said tax, are, and each thereof is, violative of the Constitution of the United States in the several particulars following, but that the Court of Appeals of the State of New York "held and adjudged that the statute under and in pursuance of which the tax herein complained of is imposed and exacted, does not, and the authority exercised under this statute in and by the imposition and exaction of the said tax does not (1) offend against the commerce clause, article 1, section 8, of the Constitution of the United States; (2) nor contravene the provisions of article 1, section 10 thereof, forbidding impairment of the obligations of contracts; (3) nor offend against article 4, section 1, thereof, requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof, forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

I.

There was no evidence before the Comptroller showing that any portion of the rolling stock of the relator was exclusively and continuously without the State of New York for the year ending October 31, 1900, or any of the other years under review.

The relator attempted to prove the portion of its rolling stock exclusively and continuously without the State of New York, in No. 81, by the use of two tables and several illustrations as to actual mileage of specific cars (Exhibit C for identification, R. 81, page 84).

The first table, Exhibit A for identification (R. 81, page 83), purports to be a division of the total equipment of relator based upon its total road mileage. That is to say, the total road mileage was 2,828.68 miles, of which 2,483.61 was in New York State and 345.07 outside the State, and, therefore, the relator argued and contended upon the basis of this total road mileage that 87.80 per cent. of the equipment was within the State and 12.20 per cent. outside the State.

It cannot be seriously urged that this theory of road mileage furnishes any evidence upon which the Comptroller could base a finding as to what amount of the property of the relator was actually employed during the year outside the State of New York.

Exhibit B for identification (R. 81, page 83) purports to give the value of the total equipment of the relator's property as $44,238,069.25, and to arrive at the amount then without the State another basis is adopted, to wit: the mileage of freight cars. That is, the total number of miles traveled by all freight cars was 540,074,721, of which 363,563,540, or

67.32 per cent. thereof, was in the State of New York and out of the State of New York, but on Vanderbilt lines, and 176,511,181 miles, or 32.68 per cent. thereof, was miles traveled by freight cars out of the State of New York and on other than Vanderbilt lines.

In this table the computation was arrived at as follows:

> "Mr. KELSEY (Comptroller): Q. This computation does not take as a basis any number of specific cars that were traced and found absent for any length of time.
>
> "A. No, sir; the mileage of cars in and out of the State is arrived at by the following method: We receive from other railroads records of the number of miles made by our cars upon other lines, but they don't give us the number of individual cars. Their reports to us will simply show 'Your cars made during the month so-and-so upon our lines so many miles;' *that might be ten or it might be fifty cars.* We assemble together all these miles made upon other roads and then divide that total between the miles made by cars on other roads in New York State and on other roads out of New York State" (R. 81 page 80).

Mr. Meeder, the witness for the relator, said (R. 81, page 80):

> "These figures do not indicate individual cars, but show simply the total miles made by the cars."

He says (R. 81, page 77):

> "The total freight car mileage shown on Exhibit B, showing the miles run by cars both in and out of New York State, was obtained from the records of the car accountant; the mileage of freight cars outside of New York State on roads other than the Vanderbilt lines was obtained from the same source; the per cent. which this latter figure bears to the former is 32.68 per cent. This percentage was applied to the total valuation of the freight cars and gave the result shown on Exhibit B, as valuation outside of New York."

The fallacy of this basis is illustrated as follows:

The purpose of the proceeding was to ascertain the value of the cars of relator continuously employed out of New York. Suppose a single car is of the value of $10,000. If that car is run continuously during the year upon the tracks of foreign railroads from San Francisco to Chicago, and thence to New Orleans, and thence to Los Angeles, it will make a great number of miles in the year, but its value remains at $10,000, just the same.

The relator also offered in evidence in No. 81, Exhibit 4 and Exhibit C for identification (R. 81, page 84), which consisted of the movements of New York Central freight cars between given dates. There are eleven of these specific cars given in the tables composing Exhibit C for identification, and are set forth at R. 81, pages 84 to 89, inclusive. The object of this testimony was as stated by counsel for the relator to be simply illustrative of the general habit of cars of the New York Central Railroad, but when the witness, Mr. Meeder, was questioned in regard to this illustration, he was asked:

> "Q. Having in mind, Mr. Meeder, the history of the movement of car No. 27,941, as shown in the Exhibit C for identification, to which your attention has been called, what have you to say as to whether that is or is not fairly illustrative of the movement of vast numbers of the freight cars of the New York Central and Hudson River Railroad Company during the year ending October 31, 1900, as regards their movement on other than so-called Vanderbilt lines?
>
> "A. I believe that this illustration of the movement of car No. 27,941, while showing dates subsequent to October 31, 1900, is an illustration of what did occur within the year ending October 31, 1900, as regards *numerous individual cars* belonging to the New York Central and Hudson River Railroad Company * * *" (R. 81, page 75).

Thus the testimony, so far as Exhibit C for identification is concerned, was illustrative, only, of the "*numerous individual*

cars," and, of course, furnished no evidence as to the actual number of individual cars continuously employed without the State, nor did it furnish a basis upon which a finding could be based as to the number and value of such cars. The testimony was purely speculative, and when the relator was seeking to obtain exemption from taxation, it was its duty to present to the Comptroller not speculative testimony or testimony in illustration of a fact, but affirmative, competent evidence bearing upon the question of fact before the tribunal for determination.

This witness was then asked (R. 81, page 74):

> "Q. Mr. Meeder, are you prepared to swear that any car or percentage of the cars and locomotives mentioned in that statement were continuously and also exclusively used without the State of New York?
>
> "A. No, sir, I am not prepared to swear to the number so employed, but so far as locomotives are concerned, I think comparatively few were so employed without the State."

Then again this witness was asked by the Comptroller (R. 81, page 78):

> "Q. Now, then, will you state for the Comptroller what the value was of the locomotives and other rolling stock of the New York Central and Hudson River Railroad which was continuously and exclusively without the State of New York?
>
> "A. I cannot tell from any information I have of the equipment so employed continuously and exclusively out of the State during the year, except upon an average basis."

Again:

> "The labor of following the movement of each individual car would be very great, and I may state as an indication of what that labor means the going through the records to pick out these individual cases which were picked out at random consumed several days of laborious tracing through all the car accountant's books."

In the testimony taken before the Deputy Comptroller in relation to the tax of 1902-3-4, the Deputy Comptroller asked (R. 587, page 33; R. 588, page 32; R. 589, page 33):

> "Q. In the testimony which you have given in relation to equipment outside of the State of New York, do you know, or has there been any computation made which would show whether or not any of the equipment of the New York Central and Hudson River Railroad Company was used continuously and exclusively without the State of New York? A. So far as I am aware, there is not.
>
> Q. None of it? A. As far as I am aware there has been no such computation in connection with this report.
>
> Q. Do you know whether there is any such equipment which is used continuously and exclusively without the State? A. I do not.
>
> Q. Do the figures which were furnished you show any such thing? A. They do not."

Whereupon counsel for the relator made the following stipulation:

> "By Counsel: It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Railroad Company, that was used permanently, continuously or exclusively without the State during the entire tax year in question."

Furthermore, it appeared before the Comptroller by the rules governing per diem settlements for the use of freight cars that foreign roads were required to pay twenty cents per car per day, "which shall be paid for every calendar day and shall be known as the per diem rate" (R. 586, 587, 588, page 52); that the relator had the right to demand the return of its car after it had been twenty days continuously on any road (R. 586, page 53; R. 587, page 53; R. 588, page 52), and if the car was held by the road more than ten days after the day of such notice, making thirty days in all thereafter,

the penalty rate of eighty cents per day in addition to the per diem rate should be paid by such foreign road for the further use of that car (*idem*).

In regard to the tax of 1902-3-4, the relator offered in evidence before the Comptroller several tables of car movements (R. 586 and 587, page 61; R. 588, page 60), and was asked by the Deputy Comptroller as follows (page 38):

> "Q. Is this offered for the purpose of proving that these cars were operated exclusively outside the State of New York, or that they were operated at all outside the State of New York, by the New York Central Company" (R. 586 and 587, page 39; R. 588, page 38)?
>
> By COUNSEL: No.
>
> Deputy Comptroller TIMERMAN: Inasmuch as it isn't claimed that these exhibits will prove either of these facts, and as a matter of fact it isn't claimed,—I suppose that that really was the fact.
>
> By COUNSEL: No. Our cars are going to and from us and back and forth between other people daily and hourly" (R. 586, 587 and 588, same pages).

Whereupon the Comptroller did not deduct from his estimate of the valuation of the capital stock of the relator any sum whatever for rolling stock or freight equipment claimed to be employed and used by it continuously and exclusively outside the State of New York.

The relator contended before the Comptroller in these cases, as in the cases of People *ex rel.* New York Central Company *vs.* Knight and Miller, that by some system of average he had established at least *prima facie* that a considerable portion of its rolling stock or freight equipment was, during the tax period, employed exclusively and continuously outside of the State of New York.

This was the *question of fact* before the Comptroller, and it is this question of fact which was conclusively determined by the unanimous affirmance of the Appellate Division and the Court of Appeals of the State of New York.

A brief analysis of the car movements will disclose the following situation: Commence with car No. 90,110 (No. 586, page 62) and continue to car 27,941 (R. 586, page 69) and then take in Exhibit G. (R. 586, pages 164 to 167, inclusive). Car 90,110 left Lockport, N. Y., September 30, 1902, destined to Oklahoma City, and was returned to the relator November 19, 1902, being absent a period of one month and nineteen days. We find that in all there were twenty-two cars, presumably selected by the relator for the purpose of showing the wide divergence of time employed in making their several passages from the home State to a foreign State and return, and we further find that the total number of days of absence of these twenty-two cars, counting thirty days to a month, was 2,703 days, or an average absence of 123 days, or four months and three days, and the witness for the relator testified before the Comptroller that these car movements were fairly illustrative of the general course of business in handling the company's freight cars.

But upon a little more careful examination of these car movements, it will be observed that one of the relator's freight cars made the trip from Weehawken to Medicine Lodge, Kansas, and return in a period of twenty-one days, the car number being 46,260 (R. 586, page 165).

Again, car No. 24,241 made the trip from Weehawken to Winnipeg, Manitoba, and return in eighteen days (R. 586, page 166), and car No. 41,278 (R. 586, page 63) delivered to the Michigan Central Railroad Company, presumably at Buffalo, was seven months and twenty-eight days making the trip to Detroit, Michigan, and return (R. 586, pages 39 and 40), and car No. 59,578, delivered to the Lake Shore Railroad Company, destined to Chicago, Illinois (R. 586, page 40), was seven months and twenty-nine days in making the trip (page 64).

If the car movements above referred to are fairly illustrative of the general course of the business in the handling of

the company's freight cars, there must be something radically wrong in the system, or some of these cars must have been wrecked on their journey and have been rolling about the country as derelicts at sea, being of no use for transportation and a menace to all other freight cars performing the service for which they were intended.

In fact, the learned counsel for the relator, in his brief in the Court of Appeals, said:

> "Comparison of the movements of these respective cars, outside of the State of New York, establishes as clearly and convincingly as any fact could be established, that in the majority of instances the time of absence of the car from relator's business and the measure of use thereof by foreign corporations on other roads bears no substantial relation to the measure of such operation required for the purpose of carrying to its destination the loading with which the car leaves relator's road and subsequent return thereof with loading destined to some point upon relator's road, or otherwise return of the car."

The fallacy of the basis of the computation adopted by the relator, and urged so strenuously, is illustrated as follows:

The duty of the Comptroller was to ascertain the number of cars of the relator continuously employed out of New York State, and we will suppose a single car is of the value of $10,000. If that car is run continuously during the year upon the tracks of foreign roads, from San Francisco to Chicago and thence to New Orleans, and thence to Los Angeles, it will make a great number of miles within one year, but its value remains at $10,000 just the same.

Another car of the value of $10,000 is run from Buffalo to Detroit and back to Buffalo, and makes but a short mileage, but its value remains at $10,000.

It is the *value of the property* of the relator that is continuously without the State which became the question of fact to be determined by the Comptroller.

The relator has reported to it the whereabouts and em-

ployment of its equipment from time to time, and such evidence is the best evidence in regard to the continuous use of any of its equipment without the State, but no such proof was offered.

In fact, the learned counsel for the relator stated in his brief in the Court of Appeals:

> "The relator's freight car equipment consisting of approximately 60,000 cars, severally constantly moving within and from and without and into this State, in such manner as to render *impracticable* the making or furnishing of data regarding specific cars or numbers thereof, which may or may not have been employed within the State at some time during the tax year."

But we submit that because evidence is difficult to furnish, because evidence is impracticable, no lawful ground is shown for reversing a judgment upon a question of fact in the absence of such evidence.

The policy of the courts has been not to disturb the findings of the assessing officers. No system of taxation can be perfect, and the courts have realized the practical difficulties with which assessing officers are so frequently confronted. The reasons which have led to a conclusion or the methods of computation have not been inquired into by appellate courts, unless that method offends some provision of the statute under consideration or of the State or Federal Constitutions.

Coulter *vs.* Louisville & Nashville R. R. Co., 196 U. S., 599-610.

People *ex rel.* Metropolitan Street Ry. Co. *vs.* State Board of Tax Commissioners, 199 U. S., 1.

This proposition was so recently considered by the Supreme Court of the United States, in the special franchise tax cases, which came up from the State of New York, that further discussion is unnecessary.

We submit, therefore, that this Court will not go behind the determination of fact by the State courts, but will regard as conclusive the conclusion of the Comptroller, upheld by the State courts, that, as *matter of fact*, the capital stock (in other words, the capital) employed within the State of New York was the amount which the Comptroller, after a full hearing, finally determined was so employed.

II.

The statute under consideration does not offend against the commerce clause of the Federal Constitution, nor does it offend against the fourteenth amendment of the Federal Constitution.

Section 182 of the Corporation Tax Law provides as follows:

> "Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually an annual tax, to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount at the rate of one-quarter of a mill for each one per centum of dividends made and declared upon its capital stock during each year, ending with the 31st day of October, if the dividends amount to six or more than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state, bears to the entire capital of the corporation."

As was said in the Commercial Cable Company case (178 N. Y., 433, 439):

> "This court has held that the term capital stock as used in the statutes similar to the one under consideration, means not share stock but the property of the corporation contributed by its stockholders, or otherwise obtained by it to the extent required by its charter."

As the relator did not pay six per cent. upon its stock, it therefore became necessary for the Comptroller to ascertain the value of the corporate property employed within the State, simply as a basis of determining the per cent. of tax to be placed upon its franchise, and, as Judge Werner said in the Commercial Cable Company case:

> "The franchise is the thing taxed, and the tax is *computed* upon the basis of the amount of its capital stock employed within the State. The share stock, or in other words, the paper certificates held and owned by individuals are not employed within the State. It is the capital represented by such certificates that is so employed."

Counsel for the plaintiff in error refers to his brief to People *ex rel.* Niagara River Hydraulic Company *vs.* Roberts, 157 N. Y., 676; People *ex rel.* Fort George Realty Company *vs.* Miller, 179 N. Y., 49, and People *ex rel.* Singer Mfg. Co. *vs.* Wemple, 150 N. Y., 49.

These cases are of limited application, and were based on a peculiar state of facts individual to each of them. They have been clearly distinguished in the last word on this subject, by the Court of Appeals of the State of New York, in People *ex rel.* Wall & Hanover Street Realty Company *vs.* Miller, 181 N. Y., 328.

Although that case was decided by a bare majority of the Court of Appeals, it has been consistently followed by a

unanimous court, which now regards that case as authority without further dissent in

People *ex rel.* The Nassau Co. *vs.* Miller, as Comptroller, 182 N. Y., 521.

People *ex rel.* The North American Co. *vs.* Miller, as Comptroller, 182 N. Y., 521.

People *ex rel.* Fourteenth St. Realty Co. *vs.* Otto Kelsey, as Comptroller, 110 App. Div. (affirmed by Court of Appeals, March, 1906, without opinion).

People *ex rel.* Hubert Apartment Association *vs.* Otto Kelsey, as Comptroller, 110 App. Div. (affirmed by Court of Appeals, March, 1906, without opinion).

It is claimed on behalf of the relator that as applied to it the tax is a tax upon interstate commerce, and that the act under which it is imposed (section 182, Tax Law) is as to the relator an attempted regulation by the State of interstate commerce, which appertains exclusively to Congress, under article 1, section 8, clause 3 of the Federal Constitution.

Assuming it to be true (although relator did not prove it) that a large number of the freight cars of relator are sent by it out of the State of New York upon longer or shorter trips, to be returned again to the relator, when unloaded. This absence from the home port, to change the metaphor, is but a temporary absence. It is quite true that foreign lines do take and hold the freight cars of relator and use them for their own traffic, but it is a game both roads play, and presumably the game is fair.

It is also true that the freight cars of relator do eventually return, as ships to their home port, as is shown by the illustration furnished by relator in its Exhibit "C" for identification.

As was said by Mr. Justice Gray, in Pullman's Palace Car Company *vs.* Pennsylvania, 141 U. S. 18:

"No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national Legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible."

Judge Haight, in the prevailing opinion in the case at bar, Record 81, page 49 of the record, said:

"As I understand this finding it is to the effect that the rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as, for instance in the city of New York, and run over the relator's road to some other point, say, the city of Buffalo. They then are transferred on to other roads and are run to points outside of the State, where they are unloaded, and then reloaded and returned to this State. * * * but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded, and are again used in the transportation of persons and property within this State."

In the State Railroad Tax Cases (92 U. S., 575) Mr. Justice Miller, in delivering the judgment of the court, referring to the rule that the situs of personal property of a corporation is at times at the principal place of business of the corporation, and again where it is actually located, said:

"But, after all, the rule is merely the law of the State which recognizes it, and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the

> former State, rather than an absolute principle in all cases. Green *v.* Van Buskirk, 5 Wall. 312. Like all other laws of a State it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

It must be clear, therefore, that even if the Legislature of the State of New York determined by section 182 of the Tax Law to tax the freight cars of the relator when temporarily outside of the State of New York, its determination to do so and to determine the situs of that personal property was the exercise of a legislative function with which the Federal courts will not interfere.

The mere fact that some portion of the property of a domestic corporation is employed in interstate or foreign commerce does not preclude the State from taxing such property within its borders and by proper legislative enactment to determine the *situs* of such property, provided, of course, that the rights and powers of the national government are not interfered with.

In Atlantic and Pacific Telegraph Company *vs.* Philadelphia, 190 U. S., 160, 163, Mr. Justice Brewer said:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States."

In People *ex rel.* P. R. R. Co. *vs.* Wemple, 138 N. Y., 1, Judge Andrews says:

> "* * * the commerce provision of the Federal Constitution does not deprive the states of the power to levy a property tax upon property employed in interstate commerce, having a situs within the jurisdiction, provided no adverse discrimination is made in the imposition of the tax between such property

and other property of a similar character. The State may subject to a property tax, in common with other property, every description of property, real and personal, having its situs there, although used or employed exclusively in the business of foreign or interstate commerce. * * * The courts have given the broadest construction to the power of a State to lay a property tax on property employed in interstate commerce, provided, as before stated, it is subjected to no unjust discrimination. * * * Such taxation, although indirectly affecting interstate commerce, is held not to be a regulation of commerce prohibited by the Federal Constitution."

In the case of Pullman's Palace Car Company *vs.* Pennsylvania (141 U. S., 18) it will be remembered that the tax levied by the State of Pennsylvania against the Pullman's Palace Car Company was levied against a foreign corporation and upon *specific property* within the State of Pennsylvania. Not upon a franchise, but purely and simply upon property. It was found that the company had at all times substantially the same number of cars within the State and continuously and constantly used there a portion of its property, and it was distinctly found, as a matter of fact, that the company continuously, throughout the period for which the taxes were levied, carried on business in Pennsylvania and had about one hundred cars within the State.

There being, therefore, in the cases at bar, no evidence before the Comptroller upon which it could be found what the value was of the rolling stock of the relator which was claimed to be continuously employed without the State, his finding thereon is correct and was properly approved by the Appellate Division, and also by the Court of Appeals of the State of New York, *as a finding of fact upon the evidence presented to the Comptroller.*

In Levis *vs.* Monson, 151 U. S., 545, Mr. Justice Brewer said:

"No question is more clearly a matter of local law than one arising under the tax laws. * * * The

> determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings, except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

The ruling of the Comptroller in the cases at bar on the question of the evidence before him, therefore, presents no Federal question. This court will not interfere to review findings of fact or the conclusions of assessing officers as to the value of property sought to be assessed.

In Kelly *vs.* Pittsburgh, 104 U. S., 78, Mr. Justice Miller said:

> "It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not, we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S., 575; Kennard *v.* Louisiana, *id.*, 480; Davidson *v.* New Orleans, 96 *id.*, 97; Kirtland *v.* Hotchkiss, 100 *id.*, 491; Missouri *v.* Lewis, 101 *id.*, 22; National Bank *v.* Kimball, 103 *id.*, 732."

It must be clear, therefore, that under the statute above referred to the State of New York does not tax any of the tangible property of the relator, but its tangible property within the State is appraised for the purpose of arriving at a basis by which the proper amount of tax shall be placed upon the relator's franchise given to it by the State, and which enables it to be a body corporate and to continue so to be and do business and employ capital for the purposes of the exercise of its corporate functions.

In the case of a foreign corporation another rule prevails in the State of New York. A foreign corporation seeks to

transact its business within the State of New York, as a body corporate, and that right is given to the foreign corporation and the basis of the taxation of the foreign corporation is the actual or tangible property which it, the foreign corporation, uses continuously within the borders of the State of New York.

This principle is well illustrated in the case of The State of New York *ex rel.* Pennsylvania Railroad Company *vs.* Knight (192 U. S., p. 21). The relator was a foreign corporation. Its cab service from its station in New York city was rendered wholly within the State. It was an independent, local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and was by this court affirmed.

If the cab service had been from New York city by ferry to various points in Jersey City, an entirely different principle would have obtained, and cabs being then engaged in interstate commerce would not have been properly taken into consideration as a basis of determining the amount of the tax upon the Pennsylvania Railroad Company within the State of New York.

The same principle is found in the case of The Delaware, Lackawanna and Western Railroad Company *vs.* Pennsylvania (198 U. S., 341). The coal which had been shipped by the Delaware, Lackawanna and Western Railroad Company to New York city and piled there for sale was property of the Lackawanna Railroad Company permanently without the State of Pennsylvania. This could not be taken into consideration by that State in fixing the tax upon the tangible property of the railroad company, because the property was outside of the territorial jurisdiction of that State; and in the recent decision in the case of Union Refrigerator Transit Company *vs.* Commonwealth of Kentucky, decided in this court at the October term, 1905, this court says:

> "Both this court and the Supreme Court of Pennsylvania are agreed in the general proposition that

> tangible property *permanently* outside of the State and having no situs within the State, could not be taxed. However temporary the stay of the coal might be in the particular foreign State where it was resting at the time of the appraising it was *definitely and forever beyond the jurisdiction of Pennsylvania*, and it was within the jurisdiction of the foreign State for the purpose of taxation, and in truth it was there taxed."

Again, Justice Brown says in his opinion in the above case:

> "We have ourselves held in a number of cases that such property *permanently* located in a State other than that of its owner, is taxable there."

In the case of Union Refrigerator Transit Company *vs.* Commonwealth of Kentucky, by reference to the decision in the Supreme Court of Kentucky, to be found at page 491, Southwestern Reporter, page 80, it will appear that there was a statute in Kentucky providing for the taxation of all the real and personal estate within the State and of all corporations organized under the laws of the State, *whether the property be in or out of the State, including intangible property*, which shall be considered and estimated in fixing the value of the corporate franchise, as hereinafter provided.

It will also appear by an examination of that case that the tax in question was not a tax upon the franchise of the Union Refrigerator Transit Company, but upon *specific property*, to wit, refrigerating cars, and it will appear that the trial was had before the county court of Jefferson county, Kentucky, and it was found as a fact that the Refrigerator Company owned 2,000 refrigerating cars of the value of $200 each, and a judgment of the County Court was rendered requiring the Refrigerator Transit Company to list such a portion of its cars as under a system of average was shown to be used in the State of Kentucky during the fiscal year, and the remainder were held not to be subject to taxation in that State.

It was from this judgment an appeal was taken to the

Supreme Court of Kentucky and the judgment reversed, and the Refrigerator Company required to list its entire 2,000 cars to be subjected to taxation within the State of Kentucky, and it was from this judgment the appeal was taken to the Supreme Court of the United States, and this court was careful to say at the close of the opinion by Justice Brown:

> "We are of the opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth."

The theory, however, upon which the prevailing opinion of the court proceeds is found in the opinion, in which a majority of this court concur; Justice Brown says:

> "Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is *wholly and exclusively* within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

Applying these principles to the case at bar, it will be conceded on the part of the plaintiff in error that *all* of its freight equipment is for a considerable portion of the year within the State of New York; that even upon the tables showing the car movements, above referred to, the identical cars themselves were within the State of New York for a period of nearly eight months of the year,—and, as claimed by the appellant, that was fairly illustrative of its car movements,—then for at least eight months of the year all of its rolling stock was within the taxing State and receiving the protection *"for which the tax is supposed to be the compensation."*

As further illustrating the system of average contended for by the learned counsel for the appellant, let us suppose that the railroad owned four dining cars, that they were located at Albany, N. Y., where they receive their supplies,

and were used in making daily trips from Albany to Boston, not for the carrying of passengers or transporting of passengers between the States, but simply for the purpose of supplying meals to the passengers en route; that two cars left Boston each day for Albany, and two cars left Albany each day for Boston, and that was their business every day in the year; that these cars were of the value of $10,000 each. Now, if we understand the argument of the relator correctly on the question of average, the Comptroller would be obliged to determine, in fixing the value of these four cars, that but two of them could enter into the computation, because at least two are continuously without the State of New York.

We respectfully submit that such a determination is entirely erroneous in any construction of the section of the Tax Law under consideration, or in any construction of the Federal Constitution.

Now, it is true that in the State of New York it has been determined in such cases as People *ex rel.* Mutual Trust Company *vs.* Miller (177 N. Y., 51) and other cases that when a corporation was organized during the year covering the tax period it should not be taxed for the entire year, but only such proportion of the year as the number of months beginning with the date of its incorporation, and ending with October 31st, the end of the tax year, bore to the entire taxation for the whole year. In other words, so many twelfths of the entire tax as were represented by the number of months beginning with the date of its incorporation to the date of the tax period.

It is also true that in such cases as People *ex rel.* N. E. Loan Co. *vs.* Roberts, which was affirmed without opinion in the Court of Appeals (156 N. Y., 688), that in ascertaining the amount of property of a foreign corporation employed within the State of New York the Comptroller may take into consideration the average balance of the bank account during the tax period, as well as the amount paid

for salaries and services and office expenses, and where it is a corporation which deals in securities the average amount of securities held by the corporation and used in the State should be considered for the purpose of arriving at the amount of the capital of the corporation employed within the State of New York. As the court said in the above case:

> "The capital of a *foreign* corporation employed within the State, is represented by the actual value of its property within the State, whether in money, or goods, or other tangible things."

In The Commonwealth *vs.* American Dredging Company (122 Pennsylvania, 386) the dredging company was assessed upon its franchise in the State of Pennsylvania, and the Auditor General and State Treasurer, the officers authorized under the statute to make the assessment, took into account $92,000 of the property of the dredging company, which was invested in four dredges, a tugboat and eleven scows, and treated that item as property without the State, and made a deduction from the capital stock of the company in the State of Pennsylvania to the extent of the above items with others. An appeal was taken from this determination by the Attorney General of Pennsylvania, and the Supreme Court in reversing the determination of the Auditor General and the State Treasurer, in giving to the dredging company the allowance of $92,000 for the above items, said:

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were *permanently* located in another State it would be liable to taxation there, but the facts show that it is not *permanently* located out of the State. From the nature of the business it is in one place today and in another tomorrow, and hence not taxable in the jurisdiction where temporarily employed. The rule as to vessels engaged in foreign or interstate commerce, is that their *situs* for the purpose of taxation is their home port of registry, or the residence of their owner

if unregistered. These vessels, if they may be so called, were not registered, hence their *situs* for taxation is the domicile of the owner. This rule must prevail in the absence of anything to show that they are *permanently* located in any State as to be liable to taxation under the laws of that State."

III.

It is respectfully submitted that no Federal question is presented in the several cases under review.

First. Because this court will not interfere with a question of fact, however erroneously it may have been determined by the trial court. (In this case the trial court was the Comptroller of the State of New York.)

Second. The State of New York makes no claim to tax any of the property of the plaintiff in error which is shown to have been permanently or continuously without the State of New York during the tax period.

Third. The statute under consideration does not purport to, nor has the determination of the Comptroller of the State of New York taken any of the property of the relator without due process of law:

(*a.*) For the reason that the plaintiff in error had opportunity to be heard upon the amount of the assessment before the Comptroller.

(*b.*) Because the plaintiff in error had the right to a writ of certiorari to review the determination of the Comptroller, and pursued that right through the courts of the State of New York.

Fourth. The plaintiff in error has equal protection under the law for the reason that all corporations within the State

of New York similarly situated to the plaintiff in error are required by the same section of the statute to share in the burdens of the State to the extent of the value of the property employed by it within the State of New York.

Fifth. It is respectfully submitted that the action of the courts of the State of New York should be affirmed and the several writs of error dismissed.

JULIUS M. MAYER,
Attorney General of the State of New York.
HORACE MCGUIRE,
Deputy Attorney General.